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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 14

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

PETITION OF MORRIS SCHOENTHAL AND FANNIE R. SCHOENTHAL FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE LONDON,
302 Broadway,
New York, N. Y.,
Attorney for Petitioners.

HORACE LONDON,
LEO GUZIK,
MARTIN PERLMUTTER,
Of Counsel.

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CONCLUSION. In view of the above, it is respectfully submitted that the writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York be reversed and a new trial ordered with directions to transfer the action to the law side of the court and to afford petitioners a trial by jury 30

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IN THE

Supreme Court of the United States

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No.....

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners by their attorney, Horace London, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on January 11th, 1932, affirming a judgment of the United States District Court for the Southern District of New York.

Questions Presented.

1. Whether an action by a trustee in bankruptcy under Section 60b of the Bankruptcy Act (11 U. S. C. A., Sec. 96) to recover a preferential payment of a debt, involving a definite sum of money, must be brought at law or in equity and whether defendant in such an action has a right to a trial by jury.

2. Whether defendants waived their rights to a jury trial at law by filing their answers to the bill of complaint in equity though the answers denied that plaintiffs had no adequate remedy at law and though prior to the trial, defendants petitioned the court to transfer the action to the law side for trial therein by a jury and renewed the motion prior to the taking of evidence.

3. In an action for the recovery of a preference, are the schedules in bankruptcy admissible against the alleged preferred creditor.

Statement.

Respondent, a trustee in bankruptcy, sued to recover $1000 from Fannie R. Schoenthal and $500 from Morris Schoenthal, alleging that the petitioners, who were creditors of the bankrupt, had received preferential payments of their debts within four months of bankruptcy.

The action was brought in equity. Petitioners, who were defendants in the court below, interposed answers denying the allegations of the complaint, including the allegation in paragraph "10th" of the complaint that the trustee had no adequate remedy at law (R. 9).

Thereafter, petitioners moved for an order transferring the case from the equity to the law side of the court and for a jury trial (R. 12). This motion, made on notice to respondent, was based on a petition alleging that a trial of the action on the equity side of the court violated petitioners' rights to a jury trial under the Seventh Amendment and under Section 267 of the Judicial Code. The motion was denied (R. 17), and the denial of this motion was assigned as error on appeal to the Court of Appeals (R. 94).

Before any evidence was taken, the motion for a jury trial was renewed and exception taken to the denial (R. 23). At the end of the plaintiff's case and at the end of the entire case, motions were made to dismiss the complaint for lack of equity jurisdiction, which were denied (R. 65; R. 71).

Judgment was rendered after trial in equity in favor of the respondent, for the sum of $538.14 against petitioner, Morris Schoenthal, and for the sum of $1075.84 against petitioner, Fannie R. Schoenthal (R. 268).

At the trial, the bankrupt's schedules of assets and liabilities were admitted in evidence over objection and exception of petitioners' counsel (R. 26).

No opinion was rendered in the court below and the opinion of the District Court was not reported (R. 220). The case, however, has been unofficially reported and is being used as a precedent in the Second Circuit (see *Irving Trust Co.* v. *Balick*, District Court, So. Dist. of New York, January 25th, 1932, quoted at p. 13, *infra*).

Specifications of Error.

1. The court erred in refusing to reverse the judgment by reason of the fact that the petitioners did not have a trial by jury.

2. The court erred in denying the motion of the petitioners for an order transferring the cause from the equity to the law side of the court and in denying the motion for a trial by jury.

3. The court erred in receiving in evidence the bankrupt's schedules of assets and liabilities.

Reasons for the Allowance of the Writ.

1. The decision of the Circuit Court is in direct conflict with decisions of the Circuit Courts in the 5th, 6th, 8th and 9th circuits, and with decisions of various district courts, and the appellate courts of the States of New York, Michigan, Indiana, Alabama, West Virginia and Illinois.

2. The Circuit Court of Appeals has decided an important question of federal and constitutional Law which has not been and should be decided by this court.

3. The judgment of the court below has deprived the petitioners of a constitutional right to a jury trial.

4. The court below has decided a question of federal and constitutional law in conflict with the decisions of the highest court of the state in which the case was tried.

5. The court below has also decided an important question of evidence as to the admissibility of the bankrupt's schedules which has not yet been passed upon by this court and upon which there is a conflict of authority.

WHEREFORE, it is respectfully submitted that this petition for the writ of certiorari be granted to the

end that the judgment of the court below and of the District Court for the Southern District of New York be reversed and the cause remanded to the District Court with directions to transfer the cause to the law side of the court and to afford petitioners a trial by jury.

Dated, February 23rd, 1932.

MORRIS SCHOENTHAL and
FANNIE R. SCHOENTHAL,
Petitioners,
By HORACE LONDON,
Attorney for Petitioners,
302 Broadway,
New York, N. Y.

LEO GUZIK,
of New York City,

MARTIN PERLMUTTER,
of New York City,
Of Counsel.

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vs.

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,
Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the District Court for the Southern District is unreported (R. 74). The Court of Appeals for the Second Circuit affirmed the District Court without opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on January 11th, 1932.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

Statement.

On July 10th, 1930, an involuntary petition in bankruptcy was filed against Leonard H. Smith and thereafter the respondent was elected trustee.

On June 9th, 1930, petitioner, Morris Schoenthal, received $500 from Leonard H. Smith in payment of a debt. On June 11th and June 19th, 1930, petitioner Fannie R. Schoenthal received two checks of $500 each, in payment of a debt of $1000. It was not disputed by the respondent that the moneys were due and owing to petitioners.

Respondent sued to recover these payments on the ground that they were preferential. No fraud was alleged or proven and the action was based solely on the ground that petitioners had reasonable cause to believe the debtor insolvent and that the payments were preferences pursuant to Section 60b of the Bankruptcy Act.

The action was brought in equity. The answers of the defendants denied the allegations of the complaint including paragraph "10th" to the effect that plaintiff had no adequate remedy at law (R. 25).

Issue was joined on October 27th, 1930 (R. 10). On February 11th, 1931, new counsel were substituted (R. 11), and on February 13th, 1931, petitioners filed a motion on notice to respondent requesting the court to transfer the case to the law side of the court and demanding a trial by jury (R. 34). By this time, the case reached the trial calendar, the court having granted the usual bankruptcy preference. The application was re-

ferred by the Justice sitting at the motion term of the District Court to the Trial Justice sitting in the equity part of the court. The motion was renewed and the Trial Justice denied the motion prior to the taking of any evidence. Petitioners duly excepted (R. 69). After plaintiff's evidence had been submitted, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction of the action (R. 65), and renewed the motion at the end of the entire case (R. 71). These rulings were assigned as error (R. 94).

In the course of the trial, respondent was permitted to place in evidence over objection and exception of petitioners' counsel the bankrupt's schedules of assets and liabilities (R. 26). This ruling was assigned as error on appeal to the Court of Appeals (R. 95).

Respondent recovered judgment for the full amount of the payments after trial in equity before District Judge Symes.

Argument.

POINT I.

While there is a conflict in the decisions, the weight of authority clearly holds that the defendants are entitled to a jury trial at law and that equity has no jurisdiction of this action.

Petitioners have been unable to find any case in the Supreme Court deciding the question in issue. The circuit courts are in irreconcilable conflict and many State courts have held that the defendant is entitled to a jury trial.

The following cases hold that equity has no jurisdiction of an action to recover a preferential payment and

that the defendants are entitled to a jury trial in an action at law:

Adams v. *Jones*, 11 Fed. (2nd) 759 (5th Cir.), cert. den., 271 U. S. 685;
Warmath v. *O'Daniel*, 159 Fed. 87 (6th Cir);
Edwards Co. v. *La Dow*, 230 Fed. 378 (6th Cir);
First State Bank v. *Spencer*, 219 Fed. 503 (8th Cir.);
Morris v. *Neumann*, 293 Fed. 974 (8th Cir.);
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Lewinson v. *Hobart Trust Co.*, 49 Fed. (2nd) 356 (D. C. N. J.);
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People's Bank v. *MacAleer*, 204 Ala. 101;
Irons v. *Bias*, 85 W. Va. 493;
McCormick v. *Page*, 96 Ill. App. 447.

The following cases hold that the defendants are not entitled to a jury trial and that the action may be brought in equity:

Parker v. *Black*, 151 Fed. 18 (2nd Cir.);
Parker v. *Sherman*, 212 Fed. 917 (2nd Cir.);
Wall v. *Cox*, 101 Fed. 403 (4th Cir.);
Off v. *Hakes*, 142 Fed. 364 (7th Cir.);
Reed v. *Guaranty Sec. Co.*, 291 Fed. 580 (D. C. Mass.);

While this court denied certiorari in the case of *Adams* v. *Jones,* 271 U. S. 685, it is important to note that the Circuit Court there held that the defendants were entitled to a jury trial and reversed a judgment for the trustee after a trial in equity. It is also respectfully submitted that the brief in that case, which has been examined by counsel, did not clearly set forth the conflict in the decisions.

In *Adams* v. *Jones,* 11 Fed. (2d) 759, a trustee brought an action in equity to recover a preferential payment. Defendant's motion for a jury trial and to transfer the case to the law side of the court was denied and judgment rendered in favor of the trustee. The Circuit Court for the Fifth Circuit reversed the judgment and directed a new trial on the ground that the defendants were entitled to a jury trial. At page 759, the court said:

> "This appeal is taken on the ground that the District Court was without jurisdiction to proceed in equity, and therefore should have granted appellant's motion to transfer the case to the law side of the docket. We do not state the substance of the evidence; it is sufficient to say that we concur in the conclusions reached by the District Judge upon the facts. We are of the opinion, however, that appellee has an adequate remedy at law, and that appellant's motion should have been granted.
>
> A common law action, such as replevin, or for money had and received, would have been effectual, and would have afforded a remedy as complete as was or could have been obtained in this equity suit.
>
> Equity jurisdiction does not attach merely for

> the reason that a suit relates to bankruptcy; but whether such a suit should be heard and determined on the equity or law side of the court depends as in other cases, on the nature of the relief sought."

In *Warmath* v. *O'Daniel,* 159 Fed. 87, the leading case on the point, the facts were again the same as in the case at bar, and the Circuit Court for the Sixth Circuit, after a thorough and critical examination of all the authorities, reversed the judgment in favor of the trustee and dismissed the bill without prejudice to an action at law. At page 88, the court said:

> "The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the Court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute."

In the recent case of *Lewinson* v. *Hobart Service Trust Co.,* 49 Fed. (2nd) 356, the court transferred an action for the recovery of a preference from the equity to the law side of the court. This case was decided by the District Court of New Jersey in the Third Circuit where there is no decision of the Circuit Court of Appeals. Judge Fake, after reviewing the authorities, said:

> "The lines of departure which mark the sharp conflict in judicial approach between the two

groups of cases above cited are explained with such logic and so convincingly are they adhered to by some of the judges that the question is fraught with much difficulty and cannot be finally settled until it reaches the court of last resort. * * * The conclusion here is that the English Court of Chancery was not exercising jurisdiction to set aside preferential transfers of personal property prior to 1789, except possibly in cases of equitable assets not subject to levy under 13 Eliz C. 5, since it was at that time well established that an adequate remedy existed at law, and, therefore, no such jurisdiction then attached to our federal courts of equity. Had the English courts been exercising such jurisdiction, our federal courts would have been ousted of it by virtue of the clear prohibition in Section 267 of the Judicial Code."

On the other side, we find the case of *Parker* v. *Black*, 151 Fed. 18, where the Circuit Court for the Second Circuit affirmed a judgment in favor of the trustee in equity and refused to require a jury trial. The court said:

"The point is taken, however, that there was a full, adequate and complete remedy at law to recover the preferential transfer in controversy; and the defense was set up in the answer. Upon this point, we think we should follow the decisions made by two different Circuit Courts of Appeal upon a state of facts practically identical with those of the present case, *notwithstanding we should have been of a different opinion if the question had been originally presented to us.* See *Wall* v. *Cox*, 101 Fed. 403, 41 C. C. A. 408; *Off* v. *Hakes*, 142 Fed. 364, 73 C. C. A. 464." (Italics ours.)

As recently as Jan. 25, 1932, in the case of *Irving Trust* v. *Balick* (So. Dist. of N. Y. unreported) District Judge Caffey denied a motion to transfer an action for the recovery of a preference, to the law side of the court. He cited the decision in this case and said:

> "The authorities (set out in notes 251 and 252 to 11 U. S. C. A., Sec. 96) are in conflict upon whether the actions should be at law or in equity, but it was held by this court as long ago as 1903 (*Pond* v. *New York National Exch. Bank*, 124 Fed. 992) and has been settled by the Court of Appeals for the Second Circuit (*Parker* v. *Black*, 151 Fed. 18; *Parker* v. *Sherman*, 212 Fed. 917) that equity is the appropriate forum. *Counsel have also informed me that recently in Irving Trust Co. v. Schoenthal, the Court of Appeals (without opinion) has affirmed a decision by Judge Symes, sitting in this court, to the same effect.* Motion denied." (Italics ours.)

An examination of these cases reflects the irreconcilable conflict among the decisions as to whether the action for a preference should be brought at law or in equity with the resultant doubt as to defendant's right to a jury trial. The Courts of Appeal for the 5th, 6th, 8th and 9th circuits have held the action to be at law, while the courts for the 2nd, 4th and 7th circuits have held the action to be in equity. The District Courts of New Jersey and Pennsylvania have held the action to be at law, while the District Courts of Massachusetts have held the action to be in equity.

It is further important to note that the Court of Appeals of New York, where this action was tried, has

held that the action is at law and that the defendant is entitled to a jury trial. (*Allen* v. *Gray*, 201 N. Y. 504).

It is respectfully submitted that the question is of prime importance and that this court should finally determine the point involved.

POINT II.

The action being for the recovery of a stated sum of money, defendants were entitled under the Constitution to a jury trial at common law.

The Seventh Amendment to the Constitution guarantees a trial by jury in all cases at common law where the value in controversy exceeds $20.00.

The Supreme Court has repeatedly held that where an action is brought for the recovery of a money judgment, and plaintiff has an adequate remedy at law, the Seventh Amendment guarantees a jury trial and the action must be brought at law and not in equity.

Whitehead v. *Shattuck*, 138 U. S. 146;
Scott v. *Neely*, 140 U. S. 106;
Henrietta Mills v. *Rutherford County*, 281 U. S. 121;
Parker v. *Winnipiseogee, L. C. & W. Co.*, 67 U. S. 545;
Hipp v. *Babin*, 19 How. 271.

In *Whitehead* v. *Shattuck*, 138 U. S. 146, an action was brought to quiet title to real property on the ground that defendant claimed title thereto. This court held that the action could not be maintained because plaintiff had an adequate remedy at law. At page 151, Mr. Justice

Field enunciated the following test to be applied in allocating the respective jurisdictions of law and equity:

> "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, *where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.*" (Italics ours.)

In *Scott* v. *Neely*, 140 U. S. 106-110, an action in equity was dismissed because plaintiff had an adequate remedy at law and defendants were entitled to a jury trial at law. This court said:

> "And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity."

This action comes squarely within the test requiring jurisdiction at law. The recovery is purely for a money judgment and no equitable remedies are invoked or necessary.

The amount sued for is definite, *i. e.*, the amount of the debt paid by the bankrupt. There is no need for any equitable remedy, real or fictitious; there is no basis for

any accounting, injunction, reformation or cancellation of documents. Of course this case is not to be confused with one where there is an illegal transfer of real property and the court must annul a deed or conveyance. The payment which the trustee complains of in this case does not differ from hundreds of other transactions which are illegal and give rise to actions for the recovery of money obtained by the wrongdoer.

In *Schank* v. *Schuchman*, 212 N. Y. 352, an action was brought in equity for a restitution of moneys claimed to have been illegally received by the defendants in violation of a state statute prohibiting the seller of merchandise from giving a buyer's agent a secret consideration to induce him to purchase merchandise. The Court of Appeals of New York State dismissed the complant and held that plaintiff had an adequate remedy at law. At page 356, Chief Judge Cardozo held:

> "The plaintiffs seem to have tried to make out a right of action in equity; but whatever rights they have, we think are legal. They do not need at this time the aid of equity. There is nothing at this time for equity to undo. * * * Equity will not entertain an action to declare a rescission of an executed transaction unless a decree announcing the rescission is essential to the suitor's protection."

In this action, there is no need for equity's powers. The transaction is simple and definite and the question is merely whether certain payments were received with knowledge of an impending bankruptcy.

POINT III.

An action for the recovery of a preference is an action at common law and not in equity.

An analysis of the early English cases shows that actions for the recovery of bankruptcy preferences were purely common law actions. The following cases were brought in trover by bankruptcy trustees or assignees for the recovery of money or personal property claimed to be preferential payments by bankrupts. These precedents conclusively show that such actions were of common law origin. All these cases were tried before a jury.

Meggot v. *Miles,* 1 Raymond 286 (1697);
Atkin v. *Barwik,* 1 Strange 165 (1715);
Alderson v. *Temple,* 4 Burr. 2235 (1768);
Hague v. *Rolleston,* 4 Burr. 2174 (1768);
Harman v. *Fishar,* 1 Cowp. 117 (1774);
Rust v. *Cooper,* 2 Cowp. 629 (1777);
Thompson v. *Freeman,* 99 Eng. Rep. 1026 (1786);
Nixon v. *Jenkins,* 2 H Blackstone 135 (1793).

In *Meggot* v. *Miles,* 1 Raymond 286 (1697), assignees in bankruptcy recovered in trover for the value of merchandise held by the defendant on the ground that a bill of sale by the bankrupt to the defendant was fraudulent and a preference because defendant had permitted the bankrupt to remain in possession.

In *Atkin* v. *Barwik,* 1 Strange 165 (1715) the bankrupt had purchased goods from the defendant. A few

days before the bankruptcy, he sent the goods to one P. for redelivery to the defendant. Assignees in bankruptcy sued the defendant in trover on the ground that the redelivery of the merchandise constituted a preference.

In *Alderson* v. *Temple,* 4 Burr. 2235 (1768), the bankrupt had been indebted to the defendant and prior to the bankruptcy sent defendant the note of a third person to apply on the debt. Lord Mansfield held that the assignees in bankruptcy could recover in trover for the amount of the note on the ground that the payment was preferential.

From these cases the conclusion irresistibly follows that the Federal Courts, when they received equity jurisdiction as it then existed in England, did not obtain jurisdiction of actions for the recovery of preferences because such actions were then properly triable at law and not in equity.

Furthermore when rigid forms of action were relaxed, the courts even held that actions to recover preferences could be brought on the theory of money had and received, or in quasi-contract, both purely legal causes of action.

Marks v. *Feldman,* L. R. 5 Q. B. 275 (1870);
Farrow v. *Mayes,* 18 Q. B. 516 (1852);
Cohen v. *Small,* 120 App. Div. 211, affd. 190 N. Y. 568.

In *Marks* v. *Feldman,* L. R. 5 Q. B. 275, a trustee brought an action at law in the Queens Bench Division for money had and received against a creditor alleged to have received a preference by a bill of sale of merchandise. The court held that an action would lie for

money had and received and at page 281, Kelly, *C. B.*, said:

> "With regard to the difficulties which have been raised herein and in the court below as to the form of action, if originally the fraudulent preference had consisted in the payment of a sum of money into the hands of the defendant, it can hardly be disputed, unless indeed we at once abrogate the law as to fraudulent preferences, that an action for money had and received could have been maintained against the favored creditor."

In *Cohen* v. *Small,* 120 App. Div. 211, aff'd 190 N. Y. 568, an action was brought in the Municipal Court of New York City to recover an alleged preferential payment. The defendant contended that the action was equitable and that the Municipal Court therefore had no jurisdiction. The Court held that the action was one at law in quasi-contract and that the court had jurisdiction. Mr. Justice Clarke held at page 216:

> "It seems to me that it is an action to enforce a contract imposed by law upon the creditor who accepts payment from an insolvent debtor. The Bankruptcy Law enters into the contract between a debtor and a creditor and gives a right to the trustee in bankruptcy to recover from the creditor any payment made in violation of the Bankruptcy Law. It is not for a penalty, nor upon a tort. A contract is implied based upon the provisions of the law under which the trustee in bankruptcy proceeds. It is a cause of action given by the statute to the trustee, which statute renders invalid the preference and the payment by the insolvent debtor to the creditor. It comes within

> the class of implied contracts wherein an obligation to repay is imposed by law, irrespective of the purpose of the parties."

From the authorities cited under this point, it is apparent that jurisdiction in equity cannot be supported on historical grounds. As far back as 1697, cases of this character were tried before juries at common law. It is only in later cases in some federal courts that the actions for preferences were clothed with equitable jurisdiction.

An examination of the early cases of *Wall* v. *Cox*, 101 Fed. 403, and *Off* v. *Hakes*, 142 Fed. 364, fails to produce a single authority therein cited supporting jurisdiction in equity. These cases practically assume that equity has jurisdiction without examination or explanation of the basis for this ruling.

On the other hand, the later cases on this subject all hold that equity has no jurisdiction and the action must be brought at law.

POINT IV.

Petitioners were entitled to a trial at law pursuant to Section 267 of the Judicial Code.

Not only did the trial in equity violate the provisions of the Seventh Amendment with respect to jury trials, but it also violated Section 267 of the Judicial Code which provides as follows:

> "Suits in equity shall not be sustained in any case where a plain, adequate and complete remedy may be had at law."

It is difficult to conceive of any reason why the remedy in this case is not adequate at law. All that respondent seeks to recover is money damages; the sum is definite and no accounting is necessary. The history of preference actions shows that as early as 1697 they were brought at law in trover and that the remedy was always deemed adequate.

It is well settled that where a plaintiff has an adequate remedy at law, equity has no jurisdiction to entertain the action.

> *Buzzard* v. *Houston,* 119 U. S. 347-352;
> *Wehrman* v. *Conklin,* 155 U. S. 314-23;
> *N. Y. Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205;
> *U. S.* v. *Bitter Root Dev. Co.,* 200 U. S. 451;
> *Equitable Life Ass. Soc.* v. *Brown,* 213 U. S. 25.

In *Buzzard* v. *Houston,* 119 U. S. 347-352, the Supreme Court said:

> "In cases of fraud and mistake, as in any other head of chancery jurisdiction, the courts of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when a like amount can be recovered at law in an action sounding in tort or for money had and received."

The fact that this proceeding arises out of a bankruptcy does not preclude the application of the provisions of Section 267 of the Code.

In *Wehrman* v. *Conklin,* 155 U. S. 314-323, this court held that the provisions of this statute, then embodied

in Section 723 of the Revised Statutes, applied to all forms of action whether authorized under Federal or State Statutes. The Court said:

> "These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action."

In *Eyster* v. *Gaff*, 91 U. S. 521, this court said:

> "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. * * * The same courts remain open to him in such contests and the statute has not ousted those courts of jurisdiction in such action."

The section of the Bankruptcy Act under which this action is brought provides that an action to recover a preference shall be brought in the "District Court"; there is no special provision for equity jurisdiction.

Section 60b of the Bankruptcy Act (11 U. S. C. A. Sec. 96b) under which this action is brought provides as follows:

> "For the purpose of such recovery, any court of bankruptcy as hereinbefore defined and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section I, Subdivision 8, of the Bankruptcy Act which defines the terms used in the Act provides as follows:

> "'Courts of bankruptcy' shall include the District Court of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii and Porto Rico."

It follows from an examination of these statutes that the Section authorizing this action merely names the District Court as the forum of litigation without providing or directing that equity have jurisdiction. In view of this fact, the section must be construed together with Section 267 of the Code, and therefore the action properly belongs at law.

In this connection it is important to note that prior to the amendment of 1910 to Section 60b, which added the language above quoted, the Federal Court had no jurisdiction of such an action without consent of the defendant.

Bardes v. *Hawarden Bank,* 178 U. S. 524;
Mitchell v. *McClure,* 178 U. S. 539.

If Congress had intended to restrict these actions to equity, it would have expressly so provided and furthermore such a provision would have been unconstitutional because of the guarantee of jury trial provided for by the Seventh Amendment.

POINT V.

Petitioners' motion to transfer the case to the law side of the court and for a jury trial was the proper procedure and the filing of the answers did not operate as a waiver of petitioners' rights.

It is respectfully submitted that the petitioners did not waive their rights to a trial by a jury at law.

The answers of the petitioners deny the allegations of the complaint that the plaintiff had no adequate remedy at law (R. 9). Issue was joined in October, 1930, and in

January, 1931, the case received a preference and was placed on the calendar for February, 1931. At the February term of Court, an application was made on notice to respondent to transfer the case from the equity to the law side of the court and for a jury trial (R. 12). This motion was denied and a motion was again made before the Trial Justice prior to the taking of evidence in the case (R. 23). Furthermore, at the end of respondent's evidence and at the end of the entire case, petitioners moved to dismiss the complaint on the ground that equity had no jurisdiction of the action (R. 65; R. 71).

It is well settled that a right to a jury trial is not waived by the filing of an answer, as long as the right is demanded before the trial is commenced and any evidence taken, and in some cases, the question may even be raised for the first time on appeal or on the court's own motion.

Twist v. *Prairie Oil & Gas Co.*, 274 U. S. 684;
Killian v. *Ebbinghaus*, 110 U. S. 568;
Parkerson v. *Borst*, 251 Fed. 242 (5th Circ.);
Kelley v. *U. S.*, 30 Fed. (2nd) 193 (C. C. A. 9th);
McConnell v. *Provident Savings L. A. Soc.*, 69 Fed. 113 (C. C. A. 6th);
Allen v. *Gray*, 201 N. Y. 504;
Equity Rule 22.

In *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, the court held that, at any time in the proceedings, either the trial or appellate court may transfer a case to the law side of the Court for lack of equity jurisdiction. At page 690, the Court said:

> "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction."

In *Parkerson* v. *Borst*, 251 Fed. 242, after the answer had been interposed, defendant moved to transfer the case to the law side of the court on the ground that equity did not have jurisdiction. The Court of Appeals for the Fifth Circuit held that the filing of the answer was not a waiver, even though the motion was made just before the taking of testimony. At page 244, the Court said:

> "The motion, however, was not to dismiss the bill but to transfer the cause to the law side of the docket of the District Court. Equity Rule 22 is as follows: 'If at any time it appears that a suit commenced in equity should have been brought as an action on the law, it shall forthwith be transferred to the law side and be there proceeded with with only such alteration in pleadings as shall be essential.' Under the terms of this rule, we think a motion to transfer is timely made if filed before any testimony has been taken and any hearing, other than on motions or on the pleadings had. The power given to the court by the rule to alter the pleadings, as may be essential to a trial on the law side of the docket, clearly contemplates a transfer after the pleadings are filed.
>
> The defendant's right to a trial by jury, under the Seventh Amendment, is not waived by his not demanding it in his answer."

In *Allen* v. *Gray*, 201 N. Y. 504, the Trustee sued in equity in the Supreme Court of the State of New York to recover an alleged preferential payment under Section 60b of the Bankruptcy Act. At the opening of the trial, defendant demanded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee on the ground that defendant was entitled to a jury trial.

In this case, not only was a motion made for the

preservation of defendants' right to a jury trial prior to the taking of any evidence, but an affirmative step was taken by the defendants in petitioning the Court to transfer the case to the law side of the court.

The point raised in the court below to the effect that the defendants did not make the motion in good faith is baseless. Because of the fact that this action received a preference under the calendar rules of the Southern District, the case was on the trial calendar within three months after joinder of issue. Petitioners' present counsel were substituted in the action in February, 1931, and at the same term, made the motion.

If petitioners are correct in their contention that the demand for a jury trial could have been made at any time, then it is immaterial that the case was on the equity calendar at the time when the motion was made.

Furthermore, the authorities go even further in holding that even if the point is not raised by the party on the trial, the appellate court may dismiss the action or transfer it to the law side upon proof that equity had no jurisdiction.

POINT VI.

Reversible error was committed by the Trial Justice in allowing in evidence the bankrupt's schedules of assets and liabilities.

The schedules in Bankruptcy were allowed in evidence over objection and exception of petitioners' counsel (R. 26). This ruling was assigned as error to the Circuit Court (R. 95).

It is respectfully submitted that this ruling constituted reversible error because the schedules are inadmissible and are not binding on the defendants.

Grant v. *Nat. Bank,* 197 Fed. 581 (D. C. N. Y.);
Batchhelder v. *Home Nat. Bank,* 218 Mass. 420;
Barr v. *Sofranski,* 130 App. Div. 783-90;
McDonough v. *Cohen,* 90 Conn. 469;
Clifton Merc. Co. v. *Conway,* 264 S. W. 192 (Tex.);
Halbert v. *Pranke,* 91 Minn. 204;
Remington Bankruptcy, 3rd Ed., Secs. 2291; 2260.

In *Grant* v. *National Bank of Auburn,* 197 Fed. 581, an action to recover a preference, Judge Ray said at page 590:

> "It is alleged that the schedules of the bankrupt show a certain amount of unsecured claims. This is equivalent to a statement that the bankrupt so represents and states, but such statement is in no way binding upon the Court or defendant, and the schedules would not be proof or evidence to establish the amount of the indebtedness of the bankrupt as against the defendant."

In Remington on Bankruptcy, *supra,* the author states the following rule:

> "The schedules filed by the bankrupt are inadmissible against the alleged preferred creditor to prove the bankrupt's insolvency. They are the admissions of a mere assignor after he has parted with his interest to the alleged preferred creditor."

Batchelder v. *Home National Bank,* 218 Mass. 420, is precisely in point. An action was brought to recover a

preference under Section 60b of the Bankruptcy Act. The Court held the bankruptcy schedules inadmissible and at page 424 said:

> "The schedules of O'Neil's assets and liabilities filed by him in the bankruptcy proceedings were not properly admissible."

No case has been found in which this Court has decided the question of the admissibility of the schedules. The Circuit Court for the Second Circuit in a prior case in reclamation proceedings left the question open for future decision (*Re Weissman*, 19 Fed. 2nd 769). The following cases have held the schedules to be admissible and thus raising a conflict of authorities:

Lyttle v. *Fifth Nat. Bank*, 39 A. B. R. 690;
Re: *Docher-Foster Co.*, 123 Fed. 190;
Hackney v. *Raymond Bros. Clarke Co.*, 68 Neb. 633;
Assn. of Credit Men v. *Bogle Furn. Co.*, 39 Utah 518.

In this action between the bankrupt's trustee and a creditor, there seems to be no basis for allowing the bankrupt's schedules to be admissible against the creditor who is not bound by the statements of the bankrupt. The list of assets and liabilities drawn by the bankrupt is made without authority from the creditor and as a matter of evidence constitutes pure hearsay.

Furthermore the schedules speak as of the date of the adjudication which of course is subsequent to the date when the alleged preference was given. For this reason, they should be inadmissible on the ground that the condition of the business on the date of bankruptcy has no

relevancy to the condition of the business at a time prior thereto.

This court has repeatedly held that there is no presumption that a bankrupt was insolvent at any time prior to the filing of a petition in bankruptcy.

Liberty National Bank v. *Bear*, 265 U. S. 365;
Gratiot State Bank v. *Johnson*, 249 U. S. 246;
J. S. & J. F. String v. *Birkahn*, 30 Fed. (2nd) 492 (C. C. A.).

CONCLUSION.

In view of the above, it is respectfully submitted that the writ of certiorari be granted to the end that the judgment of the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York be reversed and a new trial ordered with directions to transfer the action to the law side of the court and to afford petitioners a trial by jury.

Dated, February, 1932.

HORACE LONDON,
302 Broadway,
New York, N. Y.,
Attorney for Petitioners.

HORACE LONDON,
of New York City,

LEO GUZIK,
of New York City,

MARTIN PERLMUTTER,
of New York City,
Of Counsel.